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REGAL STONE LIMITED., FLEET MANAGEMENT LTD.
in personam, M/V COSCO BUSAN *in rem*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT CALIFORNIA

UNITED STATES OF AMERICA,)	Case No. C 07 06045 (SC)
)	
Plaintiff,)	IN ADMIRALTY
)	
vs.)	
)	PROPOSED CASE MANAGEMENT
)	PLAN AND PROPOSED ORDER
M/V COSCO BUSAN, LR/IMO Ship. No.)	
9231743 her engines, apparel, electronics,)	
tackle, boats, appurtenances, etc., <i>in rem</i> ,)	
THE SHIPOWNERS' INSURANCE &)	DATE: July 25, 2008
GUARANTY COMPANY LTD., REGAL)	TIME: 10:00 a.m.
STONE LIMITED, FLEET MANAGEMENT,)	JUDGE: Hon. Samuel Conti
LTD., AND JOHN COTA, <i>in personam</i> ,)	
)	
Defendants.)	

MEETING

Pursuant to the Court's Order and local Rule 16-9, the following parties and their representatives conferred on July 18, 2008:

1 **A. Appearing on behalf of Plaintiff United States:**

2 R. Michael Underhill, United States Department of Justice, Torts Branch, Civil
3 Division;

4 Bradley R. O'Brien, United States Department of Justice, Environment and
5 Natural Resources Division, Environmental Enforcement Section.

6 **B. Appearing on behalf of Defendants M/V COSCO BUSAN ("COSCO
7 BUSAN"), Regal Stone Limited (Regal Stone), and Fleet
8 Management Ltd. ("Fleet Management"):**

9 John D. Giffin, Joseph A. Walsh II, John C. Cox and Nicole S. Bussi, Keesal Young
10 & Logan.

11 **C. Appearing on behalf of Defendant John Cota ("Cota"):**

12 Walter G. Coppenrath, Jr., and George M. Jones, Coppenrath & Associates.
13

14 **I. JURISDICTION AND SERVICE**

15 **Jurisdiction:** The United States brought this suit and has alleged jurisdiction
16 pursuant to the following statutes:

17 a. 28 U.S.C. § 1345;

18 b. The National Marine Sanctuaries Act ("NMSA"), 16 U.S.C. §§ 1431, *et seq.*,
19 including sections 1437 and 1443;

20 c. The Park System Resource Protection Act ("PSRPA"), 16 U.S.C. §§ 19jj, *et*
21 *seq.*, including section 19jj-2; and

22 d. The Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701, *et seq.*, including
23 section 2717.

24 e. The Clean Water Act, 33 U.S.C. § 1321(b)(7), as amended by OPA (for
25 judicially assessed civil penalties).

26 **Service:** The United States has served all parties.

27 **Counterclaim and Third Party Claim:**

28 In conjunction with their Answer to the United States' First Amended Complaint,

1 Regal Stone and Fleet Management filed a counter-claim against the United States. By
2 agreement, the United State's answer/response is due on or before September 5, 2008.

3 Regal Stone and Fleet Management also asserted a Third Party claim against the
4 State of California pursuant to FRCP 14(c) seeking to require the State of California to
5 answer the complaint of the Plaintiff United States as if the latter had sued the State of
6 California. Regal Stone and Fleet Management have further agreed with the State of
7 California to extend the time for the State to respond to August 5, 2008.

8 In a related action, 3:08-2268(SC), Regal Stone was sued by the State of
9 California, acting by and through the Department of Transportation, for which it has
10 answered and filed a counter claim against the State of California. Regal Stone will
11 move to consolidate that action with this case on the basis that both arise out of the
12 same Incident or occurrence and to the extent that the State of California may also seek
13 natural resource damages also sought by the United States.

14 15 **II. FACTS**

16 The United States' complaint alleges that on November 7, 2007, the COSCO
17 BUSAN allided with the base and/or fendering system of the "Delta Tower," one of the
18 support towers of the western span of the San Francisco-Oakland Bay Bridge (the
19 "Incident"). The allision with the Bay Bridge resulted in a rupture of the COSCO
20 BUSAN's fuel tanks, thereby allowing fuel oil to be discharged into navigable waters of
21 the United States. The United States contends that the discharge impacted adjoining
22 shorelines of San Francisco Bay, the Pacific Ocean, the Gulf of the Farallones National
23 Marine Sanctuary and the Monterey Bay National Marine Sanctuary, and units of the
24 National Park System, including, but not limited to, the Golden Gate National
25 Recreation Area, Point Reyes National Seashore, and the San Francisco Maritime
26 National Historic Park.

27 The United States' complaint alleges that at the time of the Incident, Regal Stone
28 was the owner of the COSCO BUSAN; that Fleet Management was the operator of the

1 vessel; that Cota was the pilot of COSCO BUSAN. With respect to Regal Stone and
2 Fleet, and based upon information made public in documents filed in the criminal case
3 pending against Cota, the United States further alleges, inter alia, that said Defendants'
4 crewmen of the vessel altered and/or deleted and/or created anew various documents
5 and material evidence and, with respect to operation of the vessel itself, the United
6 States further alleges that crew of the vessel were not trained by Fleet or Regal with
7 respect to performance of essential duties aboard the vessel, including operation of
8 critical navigation equipment.

9 Regal Stone and Fleet Management generally allege in their counter-claim
10 against the United States that the United States is liable for the negligent licensing of
11 Pilot John J. Cota, insofar as it failed to determine that Pilot Cota was not medically fit
12 for duty pursuant to applicable regulations and procedures. Regal Stone and Fleet
13 Management's counter-claim alleges that the United States Coast Guard is responsible
14 for the proper licensing of Pilot Cota and that it failed to adequately perform its
15 responsibilities which proximately caused the Incident and damage to Regal Stone and
16 Fleet Management. Regal Stone and Fleet Management also generally alleged that the
17 United States is liable because its Vessel Traffic Service ("VTS") gave inaccurate and
18 confusing information to the Pilot, failed to properly monitor, advise, warn and direct
19 the Pilot so as to proximately cause the allision. Regal Stone and Fleet Management
20 assert that the United States is liable to them under maritime and common law theories
21 of negligence and that they are entitled to contribution, setoff and recoupment from the
22 United States, as well as other costs, damages, losses and penalties they may incur.

23 Regal Stone and Fleet Management generally allege in their Third Party Rule
24 14(c) claim seeking to require the State of California to answer the complaint of the
25 Plaintiff United States as if the latter had sued the State of California, that the State is
26 wholly or in part liable to the United States for its negligently issuance and renewal of
27 the license of Pilot John J. Cota and that the COSCO BUSAN oil spill was proximately
28 caused by the State's failure to use due care in its licensing, supervision and training of

Pilot Cota. Regal Stone and Fleet Management claim they are entitled in whole or in part to contribution, indemnification, and/or reimbursement for their costs, damages, losses and penalties they have incurred or may incur as a result of the State's negligence.

In signing this Case Management Plan, none of the parties herein admit, nor shall they be deemed to have admitted, any allegation made by any other party and, conversely, each party reserves any and all claims, rights, denials, and defenses as may be set out by way or answer, responsive pleading, and/or motion.

III. LEGAL ISSUES

United States' Position:

The Defendants' liability and damages, in personam and in rem, without limitation, declaratory relief, potential forfeiture, interest, and disbursements sustained by the United States under the causes of action and various statutes, including judicially assessed civil penalties under the Clean Water Act, 33 U.S.C. § 1321(b)(7) pled in the United States' First Amended Complaint. .

The United States is submitting this proposed Case Management Order solely as it relates to the instant civil judicial action and solely as a result of the Court's Orders concerning the Case Management Plan and Case Management Conference.

Defendants' COSCO BUSAN, Regal Stone and Fleet Management

Position: Reserving their right to limit liability under 33 U.S.C. §§ 2704, 2708 and 2713, the position of Defendants COSCO BUSAN, Regal Stone and Fleet Management is that the United States and State of California are liable for their proportionate share of all damages and costs resulting from the Cosco Busan allision.

IV. MOTIONS

The parties are in general agreement that this action, including discovery, presently should be stayed (with the exception of the depositions of certain crewmembers

of COSCO BUSAN who presently remain in the United States as a result of criminal proceedings pending against Defendant Cota). Trial in the latter action is currently set for October 20, 2008.

The United States' Position:

At the appropriate time, the United States may file dispositive motions relating to the counterclaims asserted by Regal Stone and Fleet Management, as well as potential motions relating to said defendants' alleged right to limit liability under provisions of the Oil Pollution Act of 1990.

Defendants' COSCO BUSAN, Regal Stone and Fleet Management Position:

a. Regal Stone and Fleet Management plan to file a motion to consolidate this action with the related case *People of the State of California v. Regal Stone et al.*, 3:2008-cv-02268-SC.

b. Regal Stone and Fleet Management will likely move the Court for an order to consolidate or in the alternative to coordinate discovery in this matter with the other related actions identified in Section X.

c. Regal Stone and Fleet Management reserve their right to file a motion to join any indispensable party under Fed. R. Civ. Proc. 19 as necessary.

Defendant John Cota's Position: Cota may move to the stay this action or at least any discovery directed to him in that the United States Department of Justice has initiated a criminal proceeding against him presently set for trial in October 2008. Consequently, any civil discovery requiring responses by Captain Cota would violate his Fifth Amendment rights. Defendant Cota also reserves his right to move for a change of venue.

V. AMENDMENT OF PLEADINGS

United States' Position:

The United States reserves the right to amend its pleading based upon

1 information discovered following the filing of the complaint, including, but not limited to,
2 information pertaining to acts and omissions of Fleet Management, Regal, and their
3 crewmen employees, as well as upon information yet to be discovered.

4 **Defendants' COSCO BUSAN, Regal Stone and Fleet Management**

5 **Position:**

6 Defendants Regal Stone and Fleet Management plan to amend their Third Party
7 14(c) claim against the State of California to address concerns raised by the State as to
8 the caption, and references to the State as a Cross-claimant.

9
10 **VI. EVIDENCE PRESERVATION**

11 The parties acknowledge and agree that the Federal Rules of Civil Procedure,
12 specifically 26(f) and this District Court's Standing Order effective since March 1, 2007
13 are sufficiently adequate with respect to preservation of evidence. Exceptions and
14 special circumstances are addressed in the proposed Case Management Plan. The
15 parties advise that they have taken and will continue to take appropriate steps to
16 preserve relevant evidence.

17
18 **VII. LITIGATION AND INITIAL DISCLOSURES**

19 The parties believe that this is a complex case, but does not believe that the
20 procedures of the Manual for Complex Litigation should be utilized.

21 The parties believe that in light of their proposal that the instant litigation be
22 stayed, and in the interest of efficiency and judicial economy, that a proposed detailed
23 case management be submitted to the Court after the stay of this litigation is no longer
24 in effect.

25 The parties intend that such future case management order shall include a
26 phased approach to litigation, with the natural resource damage component of this case
27 litigated in a latter phase. The parties further intend that initial disclosures to the
28 extent not yet made, fact and expert discovery (with the exception of certain crewmen, as

1 previously discussed), and trials shall be conducted during the appropriate phase. The
2 specific requirements shall be determined in the future case management order.

3 4 **VIII. DISCOVERY**

5 The civil depositions of three crew members were conducted in accordance with
6 the stipulation of the parties and order of the Court on May 9, 2008. Three additional
7 crew members remain in the United States as material witnesses and are scheduled to
8 give trial testimony under Rule 15 of the Fed. R. Crim. Proc. as soon as the week of July
9 21, 2008. The Parties are interested in obtaining the deposition testimony of these
10 three as yet non-deposed crew members as soon as they are released as material
11 witnesses, but before they leave the United States on the same or similar terms as the
12 May 9th stipulation. The witnesses are represented by independent counsel and are not
13 a party to this or any of the related actions. The crew members are currently invoking
14 their 5th Amendment rights based on the risks of potential criminal charges.

15 The parties believe that in light of their proposal that the instant litigation be
16 stayed, and in the interest of efficiency and judicial economy, that a proposed detailed
17 case management plan concerning discovery and related matters be submitted to the
18 Court after the stay of this litigation is no longer in effect.

19 The parties intend that such future case management order shall include a
20 phased approach to litigation, with the natural resource damage component of this case
21 litigated in a latter phase. The parties further intend that initial disclosures to the
22 extent not yet made, fact and expert discovery (with the exception of certain crewmen, as
23 previously discussed), and trials shall be conducted during the appropriate phase. The
24 specific requirements shall be determined in the future case management order.

25 26 **IX. CLASS ACTIONS**

27 Not applicable to the present action, C07-6045 SC, but see section X below with
28 respect to Chelsea, LLC v. Regal Stone, Ltd. et al, Civil Action No. 07-5800. There is

1 also a competing class action being pursued in state court.

2
3 **X. RELATED CASES**

4 Chelsea, LLC et al v. Regal Stone, Ltd. et al., Civil Action No. 07-5800; and
5 Shogren Living Trust. et al v. Regal Stone, Ltd. et al. Civil Action No. 3:07-5926.
6 *The Continental Insurance Co. v. Regal Stone, Ltd. et al.*, No. 3:08-2052
7 *The People of the State of California, Acting by and through the Department of*
8 *Transportation v. Regal Stone, Ltd. et al.*, No. 3:08-2268

9
10 **XI. RELIEF**

11 **United States' Position:**

12 The United States seeks response costs and damages, without limitations,
13 declaratory relief, potential forfeiture, interest, disbursements sustained by the United
14 States, and reserves the right to assert claims for penalties, as aforesaid.

15 Natural resource damages will be determined through a natural resource
16 damages assessment (NRDA), which is currently being conducted pursuant to
17 procedures contained in 15 CFR, Part 990. Pursuant to this process, data is being
18 collected and studies undertaken to determine the extent of injuries to natural resources
19 and will be used to select and "scale" restoration projects that will compensate the public
20 for injuries to resources and their losses or services they provide. The cost of these
21 restoration projects will determine the amount of damages. The NRDA process has to
22 date identified seven categories of potentially injured resources: birds, mammals, fish,
23 human uses and cultural resources, and rocky intertidal/sandy beach, and saltmarsh/
24 eelgrass habitats. Currently identified injuries include thousands of oiled birds, nearly
25 100 miles of oiled shoreline and habitat, and substantial lost human use days at
26 beaches, parks, and other recreation areas in the vicinity of the spill. Data collection,
27 however, is still ongoing and the scope and extent of the injuries may increase. The
28 United States intends that the ongoing NRDA process be sufficiently complete to allow

the phased approach to litigation to result in efficient litigation and preserve the court's and the parties' resources.

Defendants' COSCO BUSAN, Regal Stone and Fleet Management

Position:

Defendants COSCO BUSAN, Regal Stone and Fleet Management generally deny that they are liable to the United States as claimed.

Defendants COSCO BUSAN, Regal Stone and Fleet Management seek contribution, setoff, and recoupment of its costs, damages, losses and penalties from the United States and any additional relief Defendants are entitled to by law or in equity.

Defendants COSCO BUSAN, Regal Stone and Fleet Management seek damages, in forms of contribution and indemnification for costs, damages, losses and penalties from the State of California and any additional relief Defendants are entitled to by law or in equity.

Defendant John Cota's Position:

Defendant Cota generally denies that the United States is entitled to the relief it is seeking against him. Defendant Cota also contends that the Cosco Busan, Regal Stone and Fleet Management are obligated by statute to defend him and hold him harmless from all claims and damages.

XII. SETTLEMENT AND ADR

The parties have not participated in ADR and believe it is premature to do so. They believe however, that certain aspects, particularly with respect to natural resource damages, may lend themselves to resolution. Upon submission of a phase litigation proposal, the parties will re-evaluate and address ADR.

XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES

The United States does not consent to utilizing a magistrate judge.

1 **XIV. OTHER REFERENCES**

2 The United States does not consent to utilizing binding arbitration, a special
3 master, or the Judicial Panel of Multi District Litigation.

4
5 **XV. NARROWING OF ISSUES**

6 The parties believe a phase approach to the litigation will assist in narrowing the
7 issues.

8 **United States' Position:**

9 The United States may file dispositive motions relating to the counterclaims
10 asserted by Regal Stone and Fleet Management, as well as potential motions relating to
11 said defendants' alleged right to limit liability under the provisions of the Oil Pollution
12 Act of 1990.

13 **Defendants' COSCO BUSAN, Regal Stone and Fleet Management**
14 **Position:**

15 Defendants COSCO BUSAN, Regal Stone and Fleet Management contend that
16 the United States and the State of California played a roll in the COSCO BUSAN oil
17 spill and must be held accountable for their actions and contribute the appropriate
18 amount of damages as a result. The phased approach to this litigation will assist in
19 narrowing of these issues. Defendants also believe that this case must be consolidated
20 with *The People of the State of California, acting by and through the Department of*
21 *Transportation v. Regal Stone, Ltd. et al.*, No. 3:08-2268 and intends to bring an
22 appropriate motion. Defendants also request that the litigation be suspended until the
23 conclusion of the criminal proceedings.

24 **Defendant John Cota's Position:**

25 Defendant Cota also believes the phased litigation approach described herein shall
26 narrow the issues. Defendant Cota also contends that all discovery against him should
27 be stayed pending the final outcome of the pending criminal charges against him by the
28 federal government.

1 **XVI. EXPEDITED SCHEDULE**

2 Not applicable.

4 **XVII. SCHEDULING**

5 See above.

7 **XVIII. TRIAL**

8 The parties intend to propose a phased approach to the litigation. It is premature
9 to give an estimate of the length for trial at this point given the current criminal
10 proceedings and request for stay due to the criminal proceedings. The parties have not
11 reached agreement on whether the case could and/or would be tried to a jury or to the
12 Court. Regal Stone and Fleet Management seek a jury trial.

14 **XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS:**

15 **United States' Position:**

16 Not required

17 **Defendants COSCO BUSAN, Regal Stone and Fleet Management Position:**

18 Defendants will file their Certificates of Interested Entities or Persons required by
19 Local Rule 3-16 concurrently with the filing of this Statement.

20 **Defendant Cota Position:**

21 Defendant Cota will file his Certificate of Interested Entities or Persons required
22 by Local Rule 3-16 concurrently with the filing of this Statement.

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24 ///

25 ///

26 ///

27 ///

28 ///

1 **XX. CONCLUSION**

2 The parties propose that the Court adopt the foregoing Case Management Plan.
3 At the appropriate time (i.e., depending on the circumstances relating to the criminal
4 proceedings) the parties will come back to the Court for further scheduling and case
5 management.

6 ///

1
2 Dated: _____ KEESAL, YOUNG & LOGAN

3
4 /s/ John Giffin

By: JOHN GIFFIN

5 Attorneys for Defendants

6 REGAL STONE, LTD., FLEET MANAGEMENT, LTD.

7 *in personam*, M/V COSCO BUSAN *in rem*

8 Dated: _____ GREGORY KATSAS

9 Acting Assistant Attorney General

10 /s/ R. Michael Underhill

11 R. MICHAEL UNDERHILL

12 Attorney in Charge, West Coast Office

13 CHAD KAUFFMAN

14 Trial Attorney

Torts Branch, Civil Division

United States Department of Justice

15 RONALD J. TENPAS

16 Assistant Attorney General

Environment and Natural Resources Division

17 /s/ Bradley R. O'Brien

18 BRADLEY R. O'BRIEN

19 Senior Attorney

Environmental Enforcement Section

United States Department of Justice

20 Attorneys for Plaintiff

21 United States of America

22
23 Dated: _____ COPPENRATH & ASSOCIATES

24 /s/ Walter g. Coppenrath Jr.

25 By: WALTER G. COPPENRATH, JR.

26 Attorneys for John Cota

[PROPOSED] ORDER

The Court, having reviewed the foregoing Proposed Case Management Plan hereby ORDERS that the schedules and agreements as proposed by the parties as set forth therein are entered as the Case Management Order for this action.

IT IS SO ORDERED.

DATED: _____

UNITED STATES DISTRICT JUDGE